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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Karen L. Cowand,

10 Plaintiff,

11 v.

12 Michael J. Astrue, Commissioner of Social
13 Security Administration,

14 Defendants.

No. CV-11-00964-PHX-DGC

ORDER

15 In an Amended Order dated June 7, 2012, the Court reversed and remanded the
16 decision of the Administrative Law Judge (“ALJ”) for further proceedings pursuant to 42
17 U.S.C. § 405(g). On August 13, 2012, Plaintiff filed an application for attorneys’ fees
18 under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412. Doc. 30. On
19 August 28, 2012, Defendant filed an objection (Doc. 31), and on September 5, 2012,
20 Plaintiff filed a reply (Doc. 32). For the reasons that follow the Court will grant the
21 application for attorneys’ fees.

22 **I. Legal Standard.**

23 28 U.S.C. § 2412(d)(1)(A) provides that “a court shall award to a prevailing party
24 other than the United States fees and other expenses . . . unless the court finds that the
25 position of the United States was substantially justified or that special circumstances
26 made an award unjust.” In appeals of administrative decisions regarding benefits in the
27 Ninth Circuit, “attorney’s fees are to be awarded to a party winning a sentence four [of
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1 section 405(g)]¹ remand unless the commissioner shows that his position with respect to
 2 the issue on which the district court based its remand was substantially justified.” *Lewis*
 3 *v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002) (internal citations and quotations
 4 omitted). The Supreme Court has clarified the statutory text, holding that “a position can
 5 be justified even though it is not correct, and we believe it can be substantially . . .
 6 justified if a reasonable person could think it correct, that is, if it has a reasonable basis in
 7 law and fact.” *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988).

8 **II. Analysis.**

9 The Court vacated the decision of the ALJ because it did not provide adequate
 10 reasons for discounting the testimony of the treating physician and ignored the statement
 11 of a lay witness. Doc. 31 at 4-6, 10-11. Despite that holding, Defendant contends that
 12 attorneys’ fees should not be awarded because the government’s position satisfies the
 13 lower standard of substantial justification even if it fails the more exacting standard of
 14 being supported by “substantial evidence.” Doc. 31 at 1-2, 4-5; *see Robbins v. Soc. Sec.*
 15 *Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (holding that a decision to deny benefits will
 16 be vacated “only if it is not supported by substantial evidence or is based on legal
 17 error.”). The Court will consider each of the issues upon which remand was based to
 18 determine whether the government’s position had a “reasonable basis in law and fact.”
 19 *Pierce*, 487 U.S. at 566 n.2; *Lewis*, 281 F.3d at 1083.

20 **A. Testimony of Dr. Douglas Campbell.**

21 With respect to Dr. Campbell’s testimony, the ALJ concluded that the physician’s
 22 opinion was “too restrictive . . . given the clinical notes.” Tr. at 29. The Court held that
 23 the ALJ reached this conclusion without citing specific statements in the clinical notes
 24 that tended to show that Campbell’s opinion was actually too restrictive. Doc. 27 at 5. In

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 26 ¹ District Courts may remand under “sentence four” or “sentence six” of section
 27 405(g). Only sentence four remands – those in which the District Court “makes a
 28 determination as to the correctness of the Secretary’s position” – qualify plaintiffs as
 “prevailing parties” for an award of attorneys’ fees. *Flores v. Shalala*, 49 F.3d 562, 568
 (9th Cir. 1995) (citing *Shalala v. Schaefer* 509 U.S. 292 (1993)). In this case the Court
 issued a sentence four remand. Doc. 27.

1 defense of the ALJ's opinion, Defendant cited to "numerous findings not cited by the
2 ALJ" which the Court rejected because its analysis must be "based on the reasoning and
3 factual findings offered by the ALJ – not *post hoc* rationalizations that attempt to intuit
4 what the adjudicator may have been thinking." Doc. 27 at 6 (quoting *Bray v. Comm'r of*
5 *Soc. Sec. Admin.*, 554 F.3d 1219, 1225 (9th Cir. 2009)). Ultimately the Court concluded
6 that the ALJ "failed to set forth clear and convincing reasons for discounting the opinion
7 of Plaintiff's treating physician." Doc. 27 at 6.

8 Defendant emphasizes that the Court does not "dispute" the ALJ's findings with
9 respect to Campbell's testimony and suggests that providing the specific citations to the
10 portions of the clinical notes that the ALJ mentioned did not "create" the basis for the
11 ALJ's conclusion, but rather "bolstered" a basis that already existed. Doc. 31 at 4. In
12 order to hold that the government's position was substantially justified, however, the
13 Court must find that the government's position had a reasonable basis in fact *and* law.
14 *Pierce*, 487 U.S. at 566 n.2. The Court need not consider whether the government's
15 ultimate position on disability was correct, but rather whether the government was
16 substantially justified with respect to the procedural errors that led to remand. *Flores v.*
17 *Shalala*, 49 F.3d 562, 572 (9th Cir. 1995).

18 The procedure the ALJ must follow in order to reject the opinion of a treating
19 physician is well settled. *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). The
20 ALJ is required to make "findings setting forth specific legitimate reasons for [rejecting
21 the testimony] that are based on substantial evidence in the record . . . The ALJ can meet
22 this burden by setting out a detailed and thorough summary of the facts and conflicting
23 clinical evidence, stating his interpretation thereof, and making findings." *Id.* (citation
24 omitted). The ALJ's conclusory assertion regarding the treating physician's testimony
25 does not meet this requirement. Doc. 27 at 4. The government tried to ameliorate the
26 problem by citing specific evidence that the ALJ might have relied upon (Doc. 27 at 5),
27 but the law requiring the Court to rely solely on the ALJ's reasoning and factual findings
28 is based on "[l]ong-standing principles" of law. *Bray*, 554 F.3d at 1225. The Court

1 cannot find that the ALJ's opinion or Defendant's arguments in this Court have a
2 "reasonable basis in law." *Pierce*, 487 U.S. at 566 n.2. Accordingly, the government's
3 position is not substantially justified with respect to the discounted testimony of Dr.
4 Campbell.

5 **B. Lay witness testimony.**

6 The record contained a report of a statement by Plaintiff's husband James Cowand
7 related to Plaintiff's activities and functioning. Tr. at 185-92; Doc. 27 at 10. The ALJ
8 did not address the report in her findings, and the Court found the failure to be clear legal
9 error. Doc. 27 at 10. The ALJ "must consider lay witness testimony concerning a
10 claimant's ability to work." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th
11 Cir. 2006) (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993); 20 C.F.R.
12 § 404.1513(d)(4) & (e)). Such testimony "is competent evidence and therefore *cannot*
13 be disregarded without comment." *Id.* (emphasis in original; citation and alteration
14 omitted); *see* 20 C.F.R. § 404.1545(a)(3).

15 The ALJ did not set forth specific, legitimate reasons for discounting Mr.
16 Cowand's assertions, and the government does not offer any justification as to why that
17 such an omission was reasonable. Instead, the government again argues that the Court
18 did not "dispute" that Mr. Cowand's testimony "merely echoed Plaintiff's subjective
19 complaints," which the ALJ properly discounted. Doc. 31 at 4; Doc. 27 at 7-10.
20 Defendant calls the failure to consider the testimony "harmless error," but that misstates
21 the relevant legal test. Doc. 31 at 5. The Court must decide if the procedural error was
22 substantially justified: if it had a reasonable basis in law and fact. *Pierce*, 487 U.S. at
23 566 n.2. Because Defendant does not dispute the law regarding the treatment of lay
24 witness testimony, nor offer any justification for the ALJ's failure to comply with that
25 law, the Court cannot find that the government's position was substantially justified.

26 **III. Conclusion.**

27 The Court finds that the position of the United States was not substantially
28 justified. Pursuant to 28 U.S.C. § 2412(d)(1)(a) the Court awards Plaintiff the undisputed

1 amount of \$6,844.36. Doc. 32 at 8.

2 **IT IS ORDERED:**

3 1. Plaintiff's application for attorneys' fees (Doc. 30) is **granted**.

4 2. Defendant is **ordered** to pay attorneys' fees in the amount of \$6,844.36.

5 Dated this 15th day of October, 2012.

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David G. Campbell
United States District Judge